

**BEFORE THE INDIANA
BOARD OF SPECIAL EDUCATION APPEALS**

In the matter of L.M. and)
the Brownsburg Community School Corp.,) **Article 7 Hearing No. 999-97**
West Central Joint Services)

ORDER DISMISSING PETITION FOR REVIEW

Procedural Background

The parties hereto were involved in a dispute under 511 IAC 7-15-5, styled as “Article 7 Hearing No. 999-97.” The dispute involved issues as to whether the Brownsburg Community School Corporation and the cooperative to which it belongs, West Central Joint Services (collectively, “the School”), offered an appropriate program for L.M. (“the Student”); and, if the School did not offer an appropriate program, is the School liable for the tuition costs of an out-of-state school where the parents unilaterally placed the Student. A hearing was conducted on January 30 and February 2, 1998, by Dennis D. Graft, Esq., an Independent Hearing Officer (IHO). The IHO’s written decision was issued on February 17, 1998. The Student was represented by counsel throughout the hearing. The IHO served the Student’s counsel with the written decision, which was received on February 18, 1998. See Exhibit “A.” The IHO’s written decision, at pp. 11-12, provided any party aggrieved by the IHO’s decision detailed guidance on how to initiate administrative review before the Board of Special Education Appeals (BSEA). The IHO’s decision specifically stated that such a Petition for Review must be filed “within thirty (30) days of the date this hearing officer’s decision is received by the party....” See Exhibit “B.”

Thereafter, on March 23, 1998, the Student, by his counsel, filed by facsimile transmission a Petition for Review. In the Petition, counsel stated the Student had not received a copy of the written decision, but “counsel for the Petitioners received said decision on February 20, 1998.” Counsel for the student also indicated that he previously notified the School and the

Indiana Department of Education of his intent to appeal the IHO's decision, although no request for an extension of time was ever requested by counsel of the BSEA.

The School filed on March 25, 1998, its "Motion to Dismiss Petition for Administrative Review," asserting that counsel for the Student received the IHO's written decision on February 18, 1998, and not February 20, 1998, as asserted. As a consequence, the thirty-day limitations period ran on March 20, 1998, rendering the Petition untimely under 511 IAC 7-15-5(u)(2).¹

On April 1, 1998, the Student's counsel responded to the School's Motion to Dismiss, acknowledging the IHO's written decision was not received on February 20, 1998, as originally represented.² Counsel also acknowledges that he made the mistake in calculating the limitations period. He also asserts that he mailed the Petition for Review on March 21, 1998. However the envelope containing the Petition for Review is date-marked for March 23, 1998. See Exhibit "C."

Combined Findings of Fact and Conclusions of Law

1. Due process hearings and appeals under 511 IAC 7-3 *et seq.* ("Article 7") are governed by I.C. 4-21.5-3 and Article 7. 511 IAC 7-15-5(x), 511 IAC 7-15-6(d).
2. A party aggrieved by the written decision of an IHO has thirty (30) calendar days from receipt of the written decision to seek review by the BSEA. 511 IAC 7-15-5(u)(2), 511 IAC 7-15-6(e)(4).
3. The IHO properly notified the parties of their appeal rights in this respect. Exhibit B.
4. Counsel for the Student received the written decision on February 18, 1998. Exhibit A.
5. Service on a party can be accomplished by serving the written decision on the party's counsel. I.C. 4-21.5-3-1(c). Service on all parties was accomplished by the IHO in this

¹This section reads as follows:

(u) Any party involved shall have thirty (30) calendar days from the date the hearing officer's written decision is received to:

...

(2) initiate an appeal as described in section 6 [511 IAC 7-15-6] of this rule.

²The Response contains numerous incorrect dates, including dates which have not yet occurred. The BSEA will note that counsel meant to state he received the decision on February 18, 1998, and not April 18, 1998, as indicated in his Response.

dispute.

6. The Student had until the close of business, Friday March 20, 1998, to file the Student's Petition for Review.
7. The Student did not file his Petition for Review until March 23, 1998.³
8. The Student did not timely request an extension of time in order to prepare and file his Petition for Review, as permitted by 511 IAC 7-15-6(j).
9. The Student's Petition for Review does not conform to requirements of 511 IAC 7-15-6(e)(4), and can be dismissed, in whole or in part, at the discretion of the BSEA. 511 IAC 7-15-6(h).
10. The Student's counsel has not articulated any justification sufficient for the BSEA to exercise its discretion and toll the limitations period for equitable reasons. See, for example, Reed v. Mokena (IL) School District, 41 F.3d 1153, 1155 (7th Cir. 1994).

ORDER

In consideration of the foregoing, the School's Motion to Dismiss is granted. The Student's Petition for Review is dismissed.

Date: April 7, 1998 _____

/s/ Cynthia Dewes _____

/s/ Raymond W. Quist _____

/s/ Richard Therrien _____

Attachments: Exhibit A (Certified Mail Receipt)
Exhibit B (Pp. 11-12 of the IHO's decision)
Exhibit C (Envelope Postmarked March 23, 1998)

³Notwithstanding the Student's counsel's assertion he deposited the Petition on March 21, 1998—which is still late—I.C. 4-21.5-3-1(f)(2) indicates the date for filing a document under these circumstances is the date of the postmark on the envelope if mailed by U.S. Mail. Exhibit C.

APPEAL RIGHT

Any party to this matter may seek judicial review of the Board's decision in a civil court with jurisdiction within thirty (30) calendar days from the date of this written decision. The same timeline applies to any request for hearing costs and attorney fees under 511 IAC 7-15-6 (q).

Distribution:

Indiana Board of Special Education Appeals
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